IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 182 OF 2005

Fakir Mohammed Papamiya Attar & ors. ... Appellants.
Versus.
Motibhai Hasmuddin Attar. ... Respondent.

Shri Madhav Jamdar for the Appellants.

Shri M.L.Patil for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 24th March, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Appellants are the original Defendants. The original Plaintiff filed a suit for declaration and for possession of the suit property. In the suit it was claimed that the Respondent is the owner of the property and alternatively it was prayed that if the Court comes to the conclusion that the suit property was jointly owned by the Respondent and the father of the Appellants, then the suit property be equally divided between the parties and possession of the share of the Respondent be handed over. The sale deed in respect of the suit property stands in the name of the predecessor of the Appellants Papamiya and the Respondent. The case made out in the plaint is that the Respondent paid the entire amount of the price.

2. The defence of the Appellants in the written

statement is that in fact the deceased Papamiya was desirous of purchasing the suit property but as he was not an agriculturist, he made the Respondent who is an agriculturist as a joint purchaser in the sale deed so that no legal impediment will arise in purchase of the suit property. It is contended in the written statement by the Appellant that the suit land was exclusively purchased by the deceased Papamiya from his own source of income by paying price of Rs.10,000/-. It is contended that the Respondent/Plaintiff was trying to take undue advantage of the fact that his name was included in the sale deed.

3. The learned trial Judge held that the Appellant established that the suit property was purchased by the deceased Papamiya exclusively and the name of the Respondent was nominally shown in the sale deed. Therefore, the learned trial Judge proceeded to dismiss the suit.

4. In an appeal preferred by the Respondent/Plaintiff, the Appellate Court held that the suit property has been jointly purchased by Papamiya and the Respondent and therefore, a decree was passed for possession of the separate 1/2 share of the Respondent in the suit property. The Appellate Court held that as the sale deed clearly recites that the price is paid by both the purchasers it was not open for the Appellant to lead

evidence that the price was paid only by the deceased Papamiya. For recording the said finding the Appellate Court relied upon sections 91 and 92 of the Indian Evidence Act, 1872. The Appellate Court has also referred to section 45 of the Transfer of Property Act, 1882.

5. Shri Jamdar the learned Counsel appearing for the Appellant submitted that the suit was belatedly filed by the Respondent. He submitted that the Appellate Court has not considered the contention raised by the Appellants in the Written Statement that in fact the suit property was purchased by the Papamiya alone and only for the purpose of avoiding bar of the statute, the name of the Respondent was included in the document as he was an agriculturist. He submitted that section 91 or section 92 of the said Act of 1872 does not prevent the Appellant from raising the contention regarding the existence of benami transaction. He submitted that in fact the Respondent is trying to take undue advantage of the transaction executed jointly in the name of Papamiya and the Respondent only for the purpose of taking care of bar created by the statute against a non-agriculturist purchasing an agricultural land. He submitted that as the Respondent had come to the Court with specific case that the entire consideration was paid by him and as he failed to prove the said case, the suit should have been dismissed. The learned Counsel

for the Respondent submitted that the plea of benami transaction was not rightly considered by the Appellate Court as the alleged transaction was motivated with the object of achieving unlawful purpose. He submitted that only 1/2 share in the property has been granted by the Appellate Court to the Respondent and hence no interference is called for.

6. I have considered the rival contentions. There is some substance in the criticism of Shri Jamdar of the Appellate Court Judgment in so far as non consideration of plea of Benami transaction is concerned. The Appellate Court has however considered the oral and documentary evidence. The Appellate Court has recorded a finding that the sale deed recites that the consideration has been jointly paid by both the parties.

7. As plea of Benami transaction is not considered by the Appellate Court specifically, it is contended that an order of remand be passed so that the Appellate Court can consider the said plea. However, it is to be noted that the plea of the Appellants was that Papamiya was not an agriculturist and therefore, he could not have purchased the suit land in his own name and that is the reason why the name of the Respondent who was an agriculturist was included in the sale deed along with Papamiya. Going by the contention of the Appellants it is clear that a specific case is made out that the name

of the Respondent was included in the sale deed with the object of avoiding bar created by the statute. If the case of the Appellant regarding benami transaction is accepted, it is obvious that the benani transaction was motivated for achieving unlawful purpose, namely purchase of agricultural land by a person who is not an agriculturist. A reference will have to be made to the Judgment of the Apex Court reported in AIR 1965 S.C. 1364 (Surasaibalini Debi v/s. Phanindra Mohan Majumdar). The Apex Court has held thus:

> "32. Even where the benami is established effect will not be given to the real title if the result of doing so would be to violate the provisions of a statute or to work a fraud upon innocent persons _ Guru Namyan v. Sheo Lal Singh, 46 Ind.App.1: (AIR 1918 PC 140). On this reasoning it would prima facie appear to follow that the respondent having adopted this device of purchasing the property benami in the name of his father-in-law for the purpose of evading the provisions of the Indian Income-tax Act would not be entitled to recover the property on the basis of his title."

Therefore, this is a case where the Appellants could not

have been allowed to agitate the plea of Benami transaction as according to the case of Appellants the name of the Respondent was added in the sale deed benami with a view to avoid bar against a non-agriculturist purchasing an agricultural land.

8. Shri Jamdar the learned Counsel appearing for the Appellant relied upon another part of the same decision of the Apex to the effect that if the Respondent is trying to take advantage of a transaction which according to the Respondent is unlawful, no relief should be granted to the Respondent. The Respondent had come to the Court with two pleas taken in the alternative, one was that the Respondent was the exclusive owner of the property and the other was that in case his exclusive ownership is not accepted by the Court, 1/2 share should be allotted to the Respondent. The Appellate Court considering the fact that there was a joint acquisition by Papa Miya and the Respondent has granted only 1/2 share to the Respondent. Therefore, the said contention raised by the learned Counsel for the Appellant has no merit.

9. In so far as the delay in filing the suit is concerned, it is not the case of the Appellants that they had perfected their title to the suit property by adverse possession. In the absence of any such plea, the suit for possession based on title cannot be

defeated on the basis of mere delay.

10. No substantial question of law arises in the Second Appeal. The same is dismissed with no order as to costs.

12. At this stage Shri Jamdar prays that the ad-interim order of statusquo may be continued for a reasonable time. The said prayer is opposed by the learned Counsel for the Respondent. However, considering the fact that there was an ad-interim order passed by this Court, the same will have to be continued for a reasonable time. Hence the ad-interim order passed by this Court to continue till 30th June 2005.

Judge.